



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

August 28, 1996

Mr. Robert E. Hager  
Nichols, Jackson, Dillard,  
Hager & Smith, L.L.P.  
1800 Lincoln Plaza  
500 North Akard  
Dallas, Texas 75201

OR96-1546

Dear Mr. Hager:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. We assigned your request ID# 100283.

The City of Lancaster (the "city"), which you represent, received several requests for information relating to the arrest of a certain individual and the alleged assault of the individual by a city police officer. You contend the requested information is excepted from required public disclosure under sections 552.101, 552.102, 552.103, 552.108 of the Government Code.

Initially, we note that there is a factual dispute regarding the date that the city received one of the requests for information. In a letter to this office and in letters to the city, an attorney representing one of the requestors states that his client provided a written request to the city for the information at issue on May 10, 1996. The city indicates in letters to the attorney that the city did not receive the request until May 23, 1996. The city also states that it received other requests for the information at issue between May 21, 1996 and May 29, 1996.

The date that the city received the request for information may be significant, because section 552.301(a) of the Government Code provides that:

A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions. *The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th calendar day after the date of receiving the request.* (Emphasis added).

Pursuant to section 552.302, if a governmental body fails to request a decision as provided by section 552.301(a), the information that is the subject of the open records request will be presumed to be public information. See *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ). The city did not request an opinion from this office until May 30, 1996. Thus, if the city received a request for information on May 10, the city would have failed to timely request an attorney general's decision pursuant to section 552.301(a).

Based on the information provided to this office, the situation at hand raises a disputed question of fact regarding whether the city received the open records request on May 10, 1996. Because this office cannot resolve disputed questions of fact through the opinions process, Open Records Decision Nos. 554 (1990), 552 (1990), we are unable to resolve this issue. We will, however, address the requests for information that were received from May 21, 1996 through May 29, 1996, applying the exceptions to disclosure raised by the city to the information requested in these requests. If, however, it is established that the city received a request for information more than ten days before requesting an attorney general's decision, the requested information will be presumed to be public under section 552.302. A governmental body must show a compelling reason to withhold information to overcome this presumption of openness. *Hancock*, 797 S.W.2d at 381. Compelling reasons exist when some other source of law makes the information confidential or when the privacy or property interests of third parties are at stake. Open Records Decision No. 150 (1977) at 2.

The city asserts that the requested information is confidential under section 552.101 of the Government Code in connection with section 143.089(g) of the Local Government Code. For those municipalities that have adopted the civil service provisions of chapter 143 of the Local Government Code, section 143.089 contemplates two different types of personnel files for police officers and fire fighters: one that a police or fire department is required to maintain as part of a civil service file, and one that the department may maintain for its own internal use. Local Gov't Code § 143.089(a), (g). In *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied), the court determined that section 143.089(g) made confidential records maintained in a police department's internal personnel file relating to complaints against a police officer in which the police department took no disciplinary

action. *City of San Antonio*, 851 S.W.2d at 949. In cases in which a fire or police department takes disciplinary action against a fire fighter or police officer, section 143.089(a)(2) requires the department to place records relating to the investigation and disciplinary action in the personnel files maintained under section 143.089(a). Such records are not confidential pursuant to section 143.089(g) and must be released as required by law. Local Gov't Code § 143.089(f); Open Records Decision No. 562 (1990) at 6; *City of San Antonio*, 851 S.W.2d at 948. In the case at hand, it is unclear in which file(s) the requested material is maintained. If any of the requested information is maintained solely in the department's internal personnel files, that information is confidential pursuant to section 143.089(g).<sup>1</sup> If, however, disciplinary action was taken by the city, section 143.089(a)(2) requires the city to place records relating to the investigation and disciplinary action in the personnel files maintained under section 143.089(a). These records may only be withheld if another provision of chapter 552 of the Government Code excepts this information from disclosure. Additionally, you indicate and we assume that the records associated with the arrest of the individual are not maintained solely in the city's personnel files, but are also maintained as criminal investigation records pertaining to the alleged offenses. Thus, we consider the other exceptions to disclosure raised by the city.

You suggest that the requested information may be withheld under section 552.102 of the Government Code. Section 552.102(a) protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . . ." Section 552.102 is designed to protect public employees' personal privacy. The scope of section 552.102 protection, however, is very narrow. See Open Records Decision No. 336 (1982); see also Attorney General Opinion JM-36 (1983). The test for section 552.102 protection is the same as that for information protected by common-law privacy under section 552.101: the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.-Austin 1983, writ ref'd n.r.e.). The requested information relates to a public employee's job performance, which is a matter of legitimate public interest. See Open Records Decision No. 444 (1986) at 4. Thus, the requested information may not be withheld under section 552.102.

You also assert that the requested information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. Section 552.108 excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime," and "[a]n internal record or

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<sup>1</sup>The fact that information is confidential by law is a compelling reason to overcome the presumption of openness under section 552.302. Thus, regardless of when the city received the requests for information, information made confidential by section 143.089(g) may not be released. See *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied); Gov't Code § 552.352.

notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution.” Gov’t Code § 552.108; *see Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996). We note, however, that information normally found on the front page of an offense report is generally considered public.<sup>2</sup> *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). The information that the city submitted is “information held by a law enforcement agency . . . that deals with the detection, investigation, or prosecution of crime.” Based on *Holmes*, we conclude that, except for the type of information normally found on the first page of an offense report, section 552.108 of the Government Code excepts the requested records from required public disclosure. We note, however, that section 552.108 is discretionary with the governmental entity asserting the exception. Open Records Decision No. 177 (1977). Therefore, a governmental body may choose to release information that is excepted from disclosure under this section. *Id.*, *see also* Gov’t Code § 552.007 (governmental body may voluntarily disclose information unless prohibited by law). Additionally, because section 552.108 may be waived, this exception does not constitute a compelling reason that will overcome the presumption of openness under section 552.302.<sup>3</sup>

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay  
Assistant Attorney General  
Open Records Division

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<sup>2</sup>The content of the information determines whether it must be released in compliance with *Houston Chronicle*, not its literal location on the first page of an offense report. Open Records Decision No. 127 (1976) contains a summary of the types of information deemed public by *Houston Chronicle*. The city must release this information regardless of its location.

<sup>3</sup>Because we have resolved this matter considering the exceptions you raised, we do not address the applicability of section 552.103. We note that this office has held that first page offense report information may not be withheld under section 552.103. Open Records Decision Nos. 597 (1991), 352 (1983). Additionally, section 552.103 is a discretionary exception that may be waived by a governmental body. Open Records Decision No. 542 (1990) at 4. Therefore, the fact that a governmental body has asserted section 552.103 is insufficient to overcome the presumption of openness under section 552.302.

LRD/rho

Ref.: ID# 100283

Enclosures: Submitted documents

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